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A Proper Burial

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In his article, Professor Mark Killenbeck defends both *Korematsu v. United States*[1] and *Trump v. Hawaii*[2] on their own terms, albeit on narrow grounds. He goes on to conclude that comparisons of the two decisions don't hold up. Killenbeck has authored a thoughtful and contrarian paper, but I'm not sold. In my view, *Korematsu* simply isn't worth saving; in fact, a more complete repudiation of the internment decisions is overdue. *Trump v. Hawaii*, too, must also be revisited at the earliest opportunity and its more alarming features that abet presidential discrimination against non-citizens rejected.

Moreover, I believe that comparisons between the two disputes are warranted. When the two controversies are brought together, they underscore several themes about our prevailing constitutional order: whether during war or peacetime, a president can harm politically unpopular minorities through the law in a variety of ways, judges consistently have difficulty reaching consensus to do anything about the unequal burdens imposed by presidential policies on out-groups, and as a result, we need stronger reforms that can prevent such harms in the future.

To begin, I'm genuinely puzzled that Killenbeck would defend *Korematsu* as containing a "true core" worth recovering from the blatant racial stereotyping and sloppy analysis in the decision. He painstakingly takes apart the analysis offered by Justice Hugo Black and agrees with me, as well as the deluge of

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1. Korematsu v. United States, 323 U.S. 214 (1944); Mark R. Killenbeck, *Sober Second Thought?* Korematsu *Reconsidered*, 74 ARK. L. REV. 151, 155, 158 (2021).

2. Trump v. Hawaii, 138 S. Ct. 2392 (2018); Killenbeck, *supra* note 1, at 156-57.

critics over the years,[3] that the decision represents not only an atrocious failure of reason but also one that ratified racial hostility.[4] After all that, what's left to cheer?

Killenbeck offers two reasons for keeping *Korematsu* around: "[it] is an object lesson in bad faith" and the decision provides "the foundations for the doctrine of strict scrutiny."[5] The first reason, grounded in classroom pedagogy, is unobjectionable, and most teachers continue to teach the decision for just that reason. I'm one of them. Some decisions that no longer represent the state of the law are so reprehensible, and caused so much social and material pain in their time, that they must never be forgotten. As a matter of civic education, the internment cases should be perennially considered and their logic eviscerated in classrooms. The survival of values such as reason and equality depend on just this sort of regular performance.

I'll focus on Killenbeck's second reason, which rests on a claim about *Korematsu*'s continuing importance *as law*. This reason, I believe, collapses when one thinks about it, for what he says is valuable about the decision can be found in less tainted form elsewhere.

Let us first address Killenbeck's claim that strict scrutiny somehow represents a moral statement of our political order. The fact that a decision may be useful to judges for a doctrinal purpose is hardly a deep moral statement. Strict scrutiny is nothing more than a judge's instrument and a highly formalistic one at that.

It is also a device that is routinely dispensed with when it becomes an impediment to achieving consensus on a multi-person body. Indeed, the *Korematsu* majority made a big deal about using a form of it, but the approach was nowhere to be found in

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3. RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II 232-33 (2015); Neil Gotanda, *The Story of* Korematsu, *in* CONSTITUTIONAL LAW STORIES 250 (Michael C. Dorf ed., Found. Press 2004); ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 139-42, 164 (Aspen Publishers ed. 2001); PETER IRONS, JUSTICE AT WAR 337 (1983); Eugene V. Rostow*, The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 508-09 (1945).

4. In PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION, I contend that the internment decisions represented "the paradigmatic situation where the usual mode of debating equality not only proved disastrous for the principle of equality, but also arguably closed off more diligent efforts to do justice." ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 121-22 (2019).

5. Killenbeck, *supra* note 1, at 189

Trump v. Hawaii because its formalism is effortlessly manipulated by nefarious actors to evade accountability. When one wiggles out of having to find an impermissible "purpose," none of the tough tools associated with the mechanism ever come into play. The spectacular ease, moreover, with which Chief Justice slips out of heightened review due to context—that the decision here involves controlling entry into the country—reveals yet another aspect of its on-again, off-again importance.

Nor is there anything magical about strict scrutiny that makes it essential to the defense of individual rights.[6] There isn't deep moral insight contained either in the strict scrutiny construct or the *Korematsu* Court's use of it that couldn't be extracted from elsewhere. The ideas that racial animus is antithetical to the rule of law and violates the principle of equal regard, regardless of one's citizenship, had already been laid down in decisions decades before the federal government decided to round up people of Japanese ancestry, from cases such as *Yick Wo v. Hopkins*[7] or *Strauder v. West Virginia*.[8]

For those who take comfort in formalism, there are any number of other rulings that can easily substitute as a signal for the proposition that a state official's use of race triggers strict scrutiny, such as *Loving v. Virginia*.[9] They even serve as better illustrations of how to do it rigorously.

In truth, using strict scrutiny reflexively could even be counterproductive, by promoting an unthinking refusal to grapple with the serious stakes of a constitutional dispute. I've had more than my share of students who get tripped up by the mechanics of the tiers-of-scrutiny formula and lose sight of the key judgments entailed in constitutional interpretation that are compressed, and thereby obscured, by the tool.[10]

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6. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793 (2006); Adam Winkler, *Fundamentally Wrong about Fundamental Rights,* 23 CONST. COMMENT. 227, 239 (2006) ("[L]aws infringing upon fundamental rights are subject to strict scrutiny, but only some of those rights, only some of the time, and only when challenged by some people.").

7. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

8. Strauder v. West Virginia, 100 U.S. 303, 305-06 (1880).

9. Loving v. Virginia, 388 U.S. 1, 11 (1967).

10. I am reminded of Philip Bobbitt's diagnosis that modern Equal Protection jurisprudence has degenerated into "application and commentary revolv[ing] around 'three tiers,' 'compelling state interests,' 'fundamental rights,' and 'suspect classification[s]' to such an extent that" one might suspend judgment altogether and merely use "a chart by which

Killenbeck argues that Justice Black's opinion in *Korematsu* gave "further structure and detail" to the test, which encompassed "a retreat from reflexive disparate treatment of aliens" and "the gradual embrace of a formal test."[11] Fine, but this kind of doctrinal tinkering doesn't render the decision indispensable *as law* going forward.

In short, the legal system can carry on just fine without *Korematsu*. Whatever little doctrinal value it still has can't be extricated from the horrific circumstances or analysis. What's more, the precedent had already long been reduced to a cheap citation for most law clerks in this respect, though it has always been an odd—even offensive—choice for such routine labor.

Korematsu's demise as precedent happened due to an avalanche of moral and legal criticism from academics, activists, and government officials. So, when Chief Justice Roberts finally pronounced the precedent dead, that merely recognized that the politics of repudiation outside of the courts had, in fact, worked.[12] Killenbeck retells this part of the story in brief but faithful fashion, taking pains to point out the ethical lapses on the part of government lawyers who refused to apprise the Justices that their own intelligence contradicted their sweeping legal assertion that Japanese Americans posed a national security threat.[13]

On the other side of the ledger, the reasons to no longer treat the ruling as law have piled up over the years. Beyond its status as a horrendous instance of judicial reasoning on matters of equality, the fact that *Korematsu* has remained on the books has continued to inspire the worst sentiments. While still on the campaign trail in 2015, Donald Trump invoked FDR's actions in proposing a "complete and total shutdown" of Muslims entering the country and, when pressed, repeatedly refused to say whether the internment decisions violated America's values.[14] His allies

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a justice could locate the constitutionality of a challenged statute or 'unconstitutionality' by following columns of 'significant interest' and the like down, and rows of 'governmental interest' and so forth across." PHILIP BOBBITT, CONSTITUTIONAL FATE 55 (1982).

11. Killenbeck, *supra* note 1, at 191.

12. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

13. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 405-06, 424-25 (2011); ROBERT L. TSAI, SUPREME COURT PRECEDENT AND THE POLITICS OF REPUDIATION 35 (Austin Sarat ed., 2020).

14. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015), [https://perma.cc/QW8X-HK22]; Michael Scherer,

were not so coy, some of whom happily cited the wartime precedent in support of establishing a national registry to track Muslim people.[15]

For judges and clerks even to sprinkle *Korematsu* in their decisions confused people and kindled hope among bad actors that jurists were keeping access available to a narrow path to inequality. If anything, *Korematsu* deserves to be buried with more fanfare than Chief Justice Roberts gave it, tossed out in the course of giving a rebuttal to the dissenters' charges of complicity in *Trump v. Hawaii*. Look, the majority said, we aren't willing to tolerate animus, and to prove it to you, we are willing to say that *Korematsu* as caselaw is too tainted to be cited and promise never to do it again.[16]

But if the majority were truly interested in renouncing race-based decision-making and close the loopholes that allow government officials to engage in it, then why didn't they also toss out *Hirabayashi v. United States*? That ruling permitted a race-based curfew.[17] By getting rid of *Korematsu* without driving a stake in the heart of *Hirabayashi* leaves open the inference that certain kinds of sweeping race-based measures may still be permissible.

Pedagogically, the current state of doctrinal uncertainty elevates the need to teach the curfew decision to tease out what, if anything, survives as law. For instance, can race or religion be used to harm a minority population during a time of war? If so, what about threats or priorities that fall short of live conflict—such as race-based quarantine rules or religion-based counter-terrorism policies? In the future, when can other political minorities, especially non-citizens, expect to receive constitutional protection when a president openly announces his intention to do members of the group harm?

Exclusive: Donald Trump Says He Might Have Supported Japanese Internment, TIME (Dec. 8, 2015), [https://perma.cc/B36N-42SU].

15. Abigail Abrams, *Donald Trump Advocate Cites Japanese Internment Camps as 'Precedent' for Muslim Registry*, TIME (Nov. 17, 2016), [https://perma.cc/MB3D-YA37].

16. Chief Justice Roberts initially accused the dissenters of taking "rhetorical advantage" of *Korematsu* and insisted that it "has nothing to do with this case." *Trump*, 138 S. Ct. at 2423. He then went on to state that the decision "was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution." *Id*.

17. Hirabayashi v. United States, 320 U.S. 81, 83, 102 (1943).

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Let's turn to Killenbeck's defense of *Trump v. Hawaii* on the merits. Here, his support is tentative and procedural, resting on the fact that the case "was decided with an incomplete record" as well as uncertainty as to "exactly how [the ban] has operated and what its actual impact has been."[18] Killenbeck breathes a sigh of relief because the ruling has "the arguable virtue of not pretending that it has anything to do with heightened scrutiny."[19]

All of this is true as far as it goes. But it offers comfort only in the sense that the Court could have created more havoc with doctrine than it did. What Killenbeck misses is that the Court failed to take advantage of the opportunity to stake out an approach that addresses the recurring problems that will surely continue to arise. After all, we will see more demagogues in the future. They will also continue to enjoy expert assistance in scrubbing their illicit programs to make them more presentable. While judges can't stop those who lack civic virtue from rising to power, they do bear some responsibility for minimizing the damage. Merely regurgitating and applying rationality review is understandably alarming for the millions of people with family members who live in other countries.

Killenbeck works hard to wring some good news out of the decision, but it has the feel of damage control. Killenbeck thinks it's a close call but that the Court's decision is defensible given some uncertainty in the record. Here he rests heavily on the facial neutrality of the ban.

I agree that the ruling on the merits is defensible, but only if one takes as given an exceedingly broad view of executive discretion over immigration (existing doctrine does give a president deference when he acts pursuant to congressional authority to exclude foreigners) and then closes one's eyes to plentiful evidence of religious hostility. But we need not accept all of that as written in stone.

It's worth noting that the years-long detention of Japanese Americans caused untold suffering for more than a hundred

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18. Killenbeck, *supra* note 1, at 202, 205.

19. *Id*. at 197. For other, more robust defenses of *Trump v. Hawaii*, see William P. Barr, *The Role of the Executive*, 43 HARV. J. L. & PUB. POL'Y 605 (2020); Joshua Kemme, *Protecting Religion vs. Protecting Lives: The "Travel Ban,"* 45 N. KY. L. REV. 217 (2018).

thousand people: lost homes, businesses, wages, and educational opportunities, as well as geographic dislocation and intergenerational shame. Women gave birth in stables within the makeshift detention camps. Armed men and barbed wire policed their existence.

But what we know now about Japanese Americans' suffering doesn't make the suffering of Muslims affected by the multi-nation ban insignificant. The travel ban also caused material losses and social pain on a massive scale, though it has been harder to quantify because the people whose lives have been disrupted for the past four years are scattered across the world. There has been no systematic effort to assess the transnational toll, and these human and material costs often remain out of view of jurists focused so intently on the immediate parties before them. We are talking of loved ones kept apart, missed jobs and university degrees, and the stigma of being branded dangerous because of factors that lie beyond their control—many of the same things that today cause people to see wartime internment as a travesty.

Instead of thinking of what is merely defensible, it's worth considering what might start to approach the ideal. On that score, *Trump v. Hawaii* falls woefully short. It neither puts any serious roadblocks to religious bigotry nor helps us to smoke out policies designed to impose unequal burdens on hated minorities through surreptitious or complex means. If anything, Chief Justice Roberts created new problems by invoking the First Amendment seemingly to insulate some of a president's xenophobic and anti-Muslim remarks, instead of characterizing what he had before him as probative evidence of religious animus.[20]

He does, however, accord significance to the administration's later choice to take Iraq off the list of banned countries, saying oddly that it was "difficult to see how exempting one of the largest predominantly Muslim countries . . . can be cited as evidence of animus toward Muslims."[21] In other words, the Justices found excuses to discount evidence of pernicious intent right in front of their eyes while demanding more complete

20. Trump v. Hawaii, 138 S. Ct. 2392, 2418, 2420-21 (2018).
21. *Id*. at 2421.

evidence of bias, such as worldwide harm,[22] before drawing a negative inference against the president.

What never changed, from the moment Trump proposed a Muslim ban as a candidate to the moment he celebrated the Supreme Court's 5-4 endorsement of his policy, was the president's perception that he wanted to treat Muslim people differently than people of other faiths. Nor did his message change as the policy went through different iterations, other than to grouse that his lawyers made him "water" it down. He never once renounced his odious goal. The original slate of countries were 97% Muslim, which meant that they served as excellent proxies for religion.[23]

That the administration worked from a list that the Obama administration had once used is a red herring. The key is why did Trump and his aides settle on the countries they did and whether they could justify doing so now, rather than why a previous set of officials designed the policy they did.

Although the ban went through a few changes, it didn't change all that much. The bulk of the countries banned stayed the same; a couple were later added as fig leaves. This told us that once he got into office, President Trump was willing to accept a partial religious ban dressed up by his lawyers to appear more acceptable to judges. The facial neutrality that lawyers seized upon to defend the policy was seen as a sham by the president himself, in whom "[t]he executive Power [is] vested."[24]

What kind of judicial decision could be described as better than merely defensible? One that denied the president an opportunity to crow that he had given his supporters the Muslim ban that was promised and thereby fan the flames of anti-Islamic prejudice. Unfortunately, the Supreme Court validated his effort to rally anti-Muslim sentiment in the country through a display of sheer ingenuousness and signaled to others that it was permissible to mimic his barely-disguised inegalitarian behavior.

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22. Not only does Chief Justice Roberts seize on the fact that the policy's "text says nothing about religion," he also states that the fact that "the policy covers just 8% of the world's Muslim population" should be counted against any inference of religious animus. *Id.* But it is not a requirement that every single member of a group be harmed before an intent to harm can be drawn.

23. Alan Gomez & Richard Wolf, *Federal Appeals Court Skeptical of Trump's Travel Ban*, USA TODAY (Feb. 7, 2017), [https://perma.cc/X7GT-WWBK].

24. U.S. CONST. art. II.

Denying these consequences could have easily been accomplished without tying up a president's statutory authority to exclude in the future. One option would have been to engage in a *Cleburne*-style gloss on rational basis review in this setting by rejecting the evidence of national security concerns for justifying blanket travel bans from these particular countries.[25] Such an approach would have the benefit of invalidating the president's policy without branding him a religious bigot, if this is what stood in the way. The Justices did not take this option, though it was a plausible one under the exceedingly deferential *Mandel* framework created for visa denial situations.[26] True reform is needed to deal with ideological and status-based discrimination in this context, but that is a discussion for another time.[27]

Another option would have been to find religious animus explicitly by invoking the line of cases from the domestic religion context.[28] That would have put the Court in greatest rhetorical tension with the sitting president, but that too would have done a better job of juggling the various principles in play than blind deference.

Killenbeck contends that the evidence of animus is less plentiful in *Trump v. Hawaii*, but he never quite says the evidence is insufficient. It's true, as Killenbeck points out, that the record in *Korematsu* "made it abundantly and undeniably clear that the government actions at issue targeted, and affected, only persons of Japanese ancestry."[29] By contrast, the challengers' theory in the travel ban case was that the policy was drafted to accomplish inequality by other means.[30] If we care about illicit objectives, we have to work harder and be willing to look behind the labors of clever lawyers when they draw up a facially neutral policy.

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25. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).

26. Under Kleindienst v. Mandel, 408 U.S. 753 (1972), judges ask only whether an immigration policy is "facially legitimate and bona fide." For a terrific examination of the president's ascendant power to make immigration law, see ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020).

27. *See generally* JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES (2020).

28. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

29. Killenbeck, *supra* note 1, at 221

30. Trump v. Hawaii, 138 S. Ct. 2392, 2406 (2018).

But to say that the president's own consistent and plentiful expressions of religious bigotry are merely cynical and should be discounted is to say that serious equal protection challenges can no longer be successful unless policymakers are too obvious or stupid about their nefarious designs.

Chief Justice Roberts' remark that *Korematsu* "has been overruled in the court of history" left many other problematic features of the internment cases undisturbed.[31] That leaves open not only questions about the sincerity of the enterprise (though I don't doubt that the justices are unlikely to cite *Korematsu* in the future), but also its completeness. First, as mentioned earlier, the remaining internment decisions were left intact.

Second, nothing was said about *Ex Parte Endo*, which had declared that as a matter of statutory law, a concededly loyal individual could not continue to be held in the internment camp and must be released.[32] Because that ruling reached only the question of continued confinement of individuals, it did not alter either *Hirabayashi*'s or *Korematsu*'s affirmance of broad-scale measures that turned on race, much less the constitutionality of internment policy in the first instance.[33]

The problem with leaving *Hirabayashi* intact and *Ex Parte Endo* unmodified is that these precedents continue to empower anyone who might wish to engage in mass targeting or removal of undesirables. A plausible reading of precedent still seems to be that a president can get away with acting first—including possibly using race or some other immutable characteristic if the need is great enough—and facing consequences later.

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There's quite a bit more that can be gleaned from putting *Korematsu* and *Trump v. Hawaii* together rather than contemplating them apart. We learn that, two generations after the internment cases were decided, a president's ability to inflict mass suffering has grown exponentially, rather than diminished. His arsenal has also expanded, as new bureaucracies such as the

31. *Id.* at 2423.

32. *Ex Parte* Endo, 323 U.S. 283, 302 (1944).

33. *Id.* at 297; Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943); Korematsu v. United States, 323 U.S. 214, 223 (1944).

Department of Homeland Security and Immigration and Customs Enforcement have emerged, allowing for awesome displays of state power domestically. These bureaucracies, with their own staff and lawyers, can hunt down undesirables and facilitate life-saving care and path-altering opportunities or they can crush them in cruel fashion. Agents from one department can also be repurposed for domestic law enforcement activities, such as quelling protests.[34]

What's worse, when executive branch actors decide to rev up that immense power to harm out-groups, they possess the means to cover their tracks. DeWitt didn't feel the need to hide his anti-Japanese bigotry because he probably felt the sentiment was widely shared in his day.[35] In our own time, it has become less acceptable to be open about racial or religious animus so we should expect to see less overt expressions of bigotry, and that's to be commended. But it's also a simpler task for presidential aides to evade subpoenas or the media, obscure their roles in developing policy, relying on a many-hands approach that insists any single nefarious actor's objective has somehow been blunted by the participation of others. We need better legal doctrine that anticipates the executive branch's enhanced capacity to hide evidence of their malfeasance.

The incentives for an administration to mistreat political minorities, too, have grown, as popular movements roil American life once again. Citizens' faith in establishment figures and social organizations wanes, and ordinary people search for strong leaders—and even strong men—capable of vanquishing their ideological adversaries. Militant times call for a more responsive judiciary.

But legal constraints have not kept pace. Our laws and institutions have proven largely ineffective in preventing demagogues from acquiring power, or a president hellbent on harming a political minority from using the law to do so. To the contrary, judges have done more harm than good by either explicitly insulating pernicious politics or hiding behind the complexities of the modern administrative state. Much of current

34. Mike Baker et al., *Federal Agents Push into Portland Streets, Stretching Limits of Their Authority*, N.Y. TIMES (July 31, 2020), [https://perma.cc/3NNP-3RMK].

35. Killenbeck, *supra* note 1, at 173-74.

legal doctrine has been fashioned with technocrats and publicly-spirited officials in mind, not would-be autocrats or leaders of ethno-nationalist movements. It continues to be maintained in this way, without taking into account how much our politics has changed. That has rendered judges not only ineffectual when it matters the most, but mere adjuncts to inegalitarian policies.

One of those legacies of these years of turmoil may be more individuals who run for office as standard bearers of right-wing or left-wing social movements, or on behalf of conspiracy-based communities, with all of the attendant problems such dynamics entail. Both FDR and Trump projected themselves as leaders of a burgeoning movement of their time. FDR threw his arms around the labor movement and forged a coalition whose achievements were driven primarily by the economic needs of white Americans.[36] Black civil rights issues were made a secondary priority, while Asian Americans, not yet politically active enough to be a force, comprised a tiny fraction of that coalition. When white supporters on the West Coast pushed hard for the internment of Japanese people in part because of enduring antagonism over economic competition, the lives and welfare of Japanese immigrants became dispensable to the federal government.

Trump's "America First" nationalist movement fused white supremacist beliefs and paramilitary elements with mainstream supporters anxious about America's changing demographics and culture. From the first day of his campaign to the last days of his presidency, Trump reminded people that foreigners, people with non-conforming religious practices, and anti-police brutality activists were to be treated as enemies of the political community, while those loyal to a muscular notion of capitalist-libertarian

36. "The money changers have fled from their high seats in the temple of our civilization[,]" FDR roared at his first inaugural address on March 4, 1933. "We may now restore that temple to the ancient truths." For FDR, "[o]ur greatest primary task is to put people to work." Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *in* LILLIAN GOLDMAN L. LIBR., YALE L. SCH., [https://perma.cc/NH4T-9S5J]. By 1944, he was looking backward at the achievements of the labor movement and forward to finishing the fight against America's enemies abroad. When he presented "a second Bill of Rights," he began with "the right to a useful and remunerative job in the industries or shops or farms or mines of the Nation" and "[t]he right to earn enough to provide adequate food and clothing and recreation[.]" Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), *in* THE AM. PRESIDENCY PROJECT, [https://perma.cc/4RKV-A4FB].

freedom and to the president himself were its friends. Most of his signature policies and his public rhetoric, along with his corrupt actions, underscored this friend-enemy distinction. He may not have taken his anti-Muslim program much further given other priorities, but he proved to be the highest-ranking elected official to take the culture war directly to this out-group. For that, he will always be remembered for what is possible.

Judges don't often think enough about how future lawyers and ordinary people will use and misuse their decisions. They should. The fact of the matter is that once the highest court in the land endorses a policy, much less the cherished project of a movement figure, it is then teed up as a plan for future action. When the Supreme Court showed little resistance to the mistreatment of strangers, more policies came down the pike. An emboldened president followed up his victory in the Muslim ban case by implementing a raft of policies restricting access to asylum and visas, limiting what immigration law judges could do, and seeking to punish communities with non-citizens by undercounting them for the Census. All of these actions were foreseeable if you understand Trump was a movement president who understood himself to be pushing legal limits.

His administration cited the Muslim ban to justify a number of these moves. Other judges, too, soon got into the act. The Ninth Circuit, relying on *Trump v. Hawaii*, later upheld President Trump's ban on the entry of foreigners without pre-approved health insurance, validating anti-egalitarian policies in a new context.[37]

Another concern raised in both controversies is the risk of manufactured emergencies. As I have defined elsewhere, a fake crisis is one where a public policy problem's "nature or scope is fabricated or exaggerated beyond reasonable parameters."[38] In *Korematsu*, the United States was engaged in a very real hot war against Japan, but the asserted threat posed by Americans of Japanese ancestry was grossly exaggerated. Some within the administration tried hard to manufacture evidence of espionage

37. John Doe #1 v. Trump, 984 F.3d 848, 866-67 (9th Cir. 2020).

38. Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590, 592 (2020). A notable departure from this somnambulant judicial approach toward presidential dissembling can be found in the census decision, which I discuss at some length in *Equality is a Brokered Idea,* 88 GEO. WASH. L. REV. ARGUENDO 1 (2020).

but couldn't find much of anything; credulous judges ate up even the thin gruel presented.

Likewise, *Trump v. Hawaii* turned on whether the government could credibly show that the designation of certain majority-Muslim countries for blanket exclusions could be empirically justified. On this score, the justices in the majority showed themselves to be entirely too trusting by accepting partial and conclusory evidence of a threat. Their approach makes it a simple task for mendacious officials to get their way in the future.

In terms of how power is actually wielded, FDR's constitutional sins may lean toward omission rather than commission while Trump's involve the pursuit of an illicit vision from the get-go. But both testify to the enormous power the modern executive branch possesses to inflict harm on unpopular minorities. Instead of strictly supervising inferiors, FDR deferred to his Secretary of War Henry Stimson and Lieutenant General John DeWitt, who relied on exceedingly thin evidence that Japanese Americans posed a real risk to national security.[39] In that sense, the threat from Japan was real and imminent, but the danger from people of Japanese ancestry living in America had been largely fabricated. As Killenbeck reminds us, DeWitt was quite open about his prejudiced belief that "[a] Jap's a Jap," that the "racial strains are undiluted" in people born with Japanese ancestry no matter how long a person had lived in the United States, and that "an exact separation of the 'sheep from the goats' was unfeasible."[40] Working within the structure created by Congress, lawmaking power was delegated to military officials to govern the streets, which was then deployed in ways that singled out people of Japanese ancestry for special sanctions.

By comparison, President Trump was transparent about his inegalitarian designs from the outset. He demanded that his aides fulfill his number one campaign promise and populated key posts with people like Jeff Sessions, Stephen Miller, Mike Pompeo, and (briefly) Lt. Gen. Michael Flynn, who shared his anti-Muslim beliefs. Examined in this light, we actually have a more

39. IRONS, *supra* note 3, at 57-58.

40. Killenbeck, *supra* note 1, at 162, 172; Harrison Smith, *Aiko Herzig Yoshinaga, Whose Research Led to Internment Reparations, Dies at 93*, WASH. POST (July 26, 2018), [https://perma.cc/2P6D-BNPE].

compelling portrait of high-level responsibility for policies devised to inflict unequal harm. In fact, a former lawyer from the Office of Legal Counsel expressed regret for her role in whitewashing religious bias. She was refreshingly honest, saying that her own "portfolio . . . included matters targeting noncitizens."[41] She acknowledged that even the successive bans were "discriminatory" but that more time with lawyers "narrowed them but also made them more technocratic and therefore harder for the courts to block" under existing doctrine.[42]

By upholding a blanket policy that fell unequally on a single group, both Supreme Court decisions did something else that was similar: they raised the costs of ferreting out discrimination. Just as the internment rulings allowed the government to round people up and forced loyal citizens to sue for release by demanding a writ of habeas corpus, so too the Muslim ban decision forced individuals affected by the ban to show bias in her own case, or to prove the existence of so pervasive a pattern of visa denials that discrimination must be inferred. We may never know how many Muslim people were discouraged by the bans from even seeking a visa. Whether individual lawsuits can prevail at all remains to be seen, but there's little doubt that pushing equality-based claims almost exclusively into the as-applied format has made them harder and more expensive to litigate.[43] For most, it won't even be worth the effort. President Trump's efforts, with the cooperation of the High Court, ensured that the ban remained intact for his entire presidency.

The bottom line: from the perspective of egalitarianism, both *Korematsu* and *Trump v. Hawaii* made things worse by making it easier for government officials to disregard their obligations.

I want to be clear about something: Killenbeck in no way endorses presidential harassment of unpopular minorities. Nor does he embrace authoritarianism or any other anti-democratic

41. Erica Newland, *I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020), [https://perma.cc/2RBR-FDAR].

42. *Id.*

43. Plaintiffs would have to rely on *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), but satisfy the tougher glosses put on as-applied arguments given by cases like *Washington v. Davis*, 426 U.S. 229, 239, 242, 246-48 (1976), and *McCleskey v. Kemp*, 481 U.S. 279, 315-19 (1987).

ethos. In fact, if anything, what separates us may be his faith that getting rules right will mean that decisionmakers will get outcomes right. But I fear that his telescoped defense of these two cases may wind up replicating approaches and habits that prevent us from seeing the whole picture or the need for reform. And that dismal picture remains one where presidents enjoy largely unrestrained authority to harm unpopular minorities, while other institutions stand idly by.